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No. 86-2028

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Illinois State Board of Education has standing and capacity to file suit on behalf of school children alleging violation of the Equal Educational Opportunities Act of 1974.

II. Whether the ISBE has parens patriae standing to assert the rights of school children in a suit that charges a local school district with discrimination.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

The Petitioner quotes the Supremacy Clause as a "Constitutional Provision Involved". The Supremacy Clause is not pertinent to this appeal as no conflict exists between federal and state law.

United States Statute

This case involves section 1706 of the Equal Educational Opportunities Act, 20 U.S.C. §1706, which provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

ADDITIONAL STATEMENT

Respondent disputes the Illinois State Board of Education's ("ISBE") contention that the counterclaim seeks to enjoin the Board of Education of the City of Peoria ("the Peoria District") from violating the EEOA. The counterclaim contains no reference to the EEOA.

In the district court, the ISBE's theory of standing was based upon the assertion that the ISBE was exposed to potential liability as a result of the Peoria District's actions. Paragraph 3 of the counterclaim provides:

> "Under §2-3.3 of The School Code (Ill.Rev.Stat. 1983, ch. 122, par. 2-3.3.), the Defendant, ISBE, has the power and duty to supervise all public schools in the State of Illinois. Due to this power and duty, liability can be asserted against Defendant ISBE in federal court if: 1) Defendant ISBE discovers that a school district under its supervision is intentionally violating the civil rights of students secured by the United

> States Constitution and by federal law and 2) should Defendant ISBE then fail to take reasonable steps to attempt to correct such violations of student's civil rights by a school district under its supervision".

The court of appeals held that the ISBE had no standing to sue as it "had no statutory authority to bring suit." 810 F.2d at 709 n.3. The court of appeals denied the ISBE's petition for rehearing and suggestion for rehearing en banc, as no judge in active service requested a vote on the petition and a majority of the judges on the panel voted to deny a rehearing.

SUMMARY OF ARGUMENT

The ISBE has neither standing nor capacity to sue to enforce the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701 et. seq. ("EEOA" or the "Act"). Section 1706 of the EEOA provides that only individuals denied an equal

educational opportunity and the United States Attorney General may bring an action to enforce its terms. Congress expressly limited the parties who may file suit to enforce the EEOA. State level educational agencies have no authority to do so.

Assuming Congress had attempted to grant standing to the ISBE to enforce the EEOA by civil suit, such attempt would have been ineffective. The ISBE cannot allege the necessary constitutional injury to satisfy the standing requirement of Article III of the federal Constitution.

The ISBE does not have parens patriae standing as it is a state agency with only limited authority granted by the Illinois constitution and the Illinois legislature. The ISBE does not have the sovereign powers of the State of Illinois. Furthermore, the ISBE's counterclaim seeks

to correct an alleged problem arising within the control of the State of Illinois and its legislature.

ARGUMENT

I. THE STATE BOARD OF EDUCATION HAS NO STANDING OR CAPACITY TO SUE TO ENFORCE THE EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974.

Petitioner's main argument is that it was authorized, if not mandated, by the EEOA to sue the Peoria District to enforce the Act. The ISBE's argument is unsound in two respects. First, the ISBE's counterclaim does not refer to the EEOA. Second, the EEOA delimits the parties who may bring suit to enforce its terms. None of those parties are state level educational agencies.

A. The ISBE Did Not Plead A Violation Of The EEOA By The Peoria District.

The ISBE's Petition for a Writ of Certiorari ("Petition") states that its

counterclaim seeks to enjoin the Peoria District from operating a segregated program in violation of the EEOA. The ISBE further argues that it has standing to enforce the EEOA. The ISBE counterclaim, however, makes no reference to the EEOA. The EEOA is not alleged as a basis for jurisdiction, nor is it alleged that the Peoria District violated the EEOA. Pleadings must contain allegations showing that the complainant is the proper party to file suit. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). Petitioner's counterclaim does not allege a breach of the EEOA and the Act therefore cannot form the basis of a standing claim.

B. The EEOA Permits Suit Only By Individuals Denied An Equal Educational Opportunity And The Attorney General Of The United States.

Assuming the ISBE's right to bring suit under the EEOA is considered, despite the fact that an EEOA violation was not pleaded, the ISBE is not a proper party to file suit to enforce the Act. The ISBE's argument is based upon the erroneous assumption that it has standing and capacity to bring suit to enforce the Act. Standing to enforce the EEOA is granted by section 1706 of the Act, reference to which is noticeably absent in the ISBE's Petition. Section 1706 provides:

> "An individual denied an equal educational opportunity, as defined by this sub-chapter, may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual."

Congress specifically limited standing to individuals denied an equal educational opportunity and the Attorney General of the United States. Nowhere are state level agencies authorized to file a civil action to enforce the statute.

It is well established that Congress may place limitations upon parties authorized to file suit to enforce federal statutes. In Sierra Club v. Morton, 405 U.S. 727, 732 (1972), this Court stated:

> "Where, however, Congress has authorized public officials to perform certain functions according to the law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

In Sierra Club the Court further stated:

> ["w]here a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular

> issue,' [citation], is one within the power of Congress to determine." 405 U.S. at 732 (1972)

In Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577 (1982), this Court held that the expedited review procedures of section 310(a) of the Federal Election Campaign Act of 1971, 2 U.S.C. §437h(a), could be invoked only by the three parties specifically named in the statute. 455 U.S. at 583-84. The Bread Court refused to "read an implicit grant of standing into Congressional silence." 455 U.S. at 584.

Where a party bases a claim of standing or capacity to sue on a federal statute, that party must be one authorized by Congress to maintain the action. See Warth v. Seldin, 422 U.S. 490, 501, (1975); Locals 666 & 780 v. United States Department of Labor, 760 F.2d 141, 143-144 (7th Cir. 1985). Section 1706 of the EEOA

specifically delimits the parties who may bring a civil action to enforce the EEOA. Those parties are the United States Attorney General and individuals denied an equal educational opportunity.[1] The individuals denied an equal educational opportunity are the students. No other parties have authority to bring suit, nor to have a suit brought on their behalf. See Castaneda v. Pickard, 648 F.2d 989, 999 (5th Cir. 1981); Kiper v. La. State Board of Elementary & Secondary Education, 592 F.Supp. 1343, 1348 (N.D. La. 1984), aff'd, 778 F.2d 789 (1985); United States v. School District of Ferndale, Michigan,

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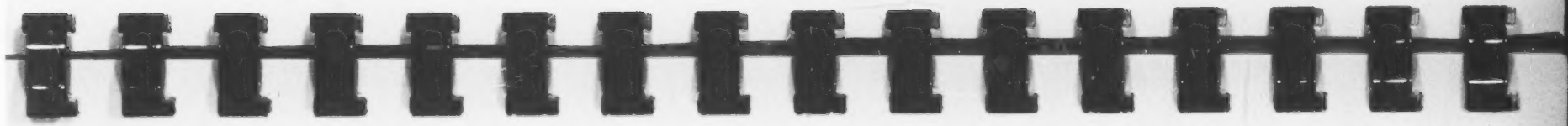
[1]This grant of standing is more limited than that granted by federal statutes which authorize suit by "any person aggrieved". See 20 U.S.C. 1415(e)(2) (suits to protect rights of handicapped children); 42 U.S.C. §2000(d)(2) (suits to enforce the right to be free from discrimination under federal financial assistance program).



400 F.Supp. 1122, 1128-29 (E.D. Mich. 1975), aff'd in part, see 577 F.2d 1339, 1344, n. 6 (1978).

That the ISBE has no authority to institute suit to enforce the EEOA is further shown by sections 1709 and 1710 of the Act, 20 U.S.C. §§ 1709, 1710. Section 1709 permits the Attorney General to intervene in a suit begun by an individual. Section 1710 requires the Attorney General, prior to instituting suit, to give notice to the appropriate educational agency of the conditions which, in his judgment, constitute a violation of the Act. The Attorney General must also certify to the appropriate district court that he is satisfied the educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action. These limitations

confirm that the Attorney General is the only party, other than an individual denied an equal educational opportunity, who may bring an action.

Nothing in the EEOA authorizes a state level educational agency to file suit to enforce its terms. The EEOA merely provides that an educational agency, in exercising the authority granted it, must not exercise that authority in such a manner as to deny an individual an equal educational opportunity. The Act does not expand the authority of a state educational agency over what it perceives to be discrimination within a local district.[2] As the court of appeals

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[2]The ISBE's argument that its authority is derived from federal law is contradicted by the ISBE's pleading. Paragraph 2 of the ISBE counterclaim provides in pertinent part:

"The Defendant ISBE is a division within

(Footnote Continued)

in this case aptly noted, all of the cases cited by the State Board:

> "[m]erely stand for the proposition that a state board of education is a proper party defendant when the plaintiff alleges that its failure to fulfill its responsibilities under state law has produced state non-compliance with the EEOA." 810 F.2d at 713.

The court of appeals correctly held that the ISBE was not a proper plaintiff to bring an action under the EEOA.

Assuming, arguendo, that Congress attempted to grant standing to the ISBE to file suit to enforce the EEOA, such attempt would have been invalid. Congress may grant standing to the full extent

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(Footnote Continued)

> the executive branch of the government of the State of Illinois created by Article X, Section 2 of the 1970 Constitution of the State of Illinois. The Defendant ISBE's powers and duties are established by the Constitution of the State of Illinois and by state law".

permitted by Article III of the United States Constitution, but Congress may not grant standing to a party who has not suffered a distinct injury so as to meet the constitutional requirements of Article III. In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979), the Court stated:

> "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' (citation) In no event, however, may Congress abrogate the Art. III minima: A. Plaintiff must always have suffered "a distinct and palpable injury to himself," ibid., that is likely to be redressed if the requested relief is granted." (citation)

See also Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972). Even if Congress attempted to grant standing to the ISBE, the ISBE would not be a proper party to file suit, as ISBE has not suffered "a

distinct and palpable injury."[3] There is no suggestion or argument in the ISBE's Petition that it has suffered, or that it was threatened with, a distinct and palpable injury as a result of the alleged discrimination by the Peoria District. The ISBE is precluded from raising this issue, as issues not raised in the petition are not before the Court. Namet v. United States, 373 U.S. 179, 190 (1963).

Furthermore, assuming the ISBE could argue that it had suffered an injury, the argument is meritless. Plaintiff's theory of standing has changed from that advanced in the district court. As noted above, the ISBE's counterclaim contains no

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[3] In Fisher v. Tucson School Dist. No. 1 625 F.2d 834, 838 (9th Cir. 1980), the court held that the EEOA did not grant plaintiff standing where the plaintiff could show no "personal impact" of "constitutional dimension."

reference to the EEOA. The only attempt to allege a constitutional injury to the ISBE is contained in paragraph 3 of the counterclaim which provides:

> "Under §2-3.3 of The School Code (Ill.Rev.Stat. 1983, ch. 122, par. 2-3.3.), the Defendant, ISBE, has the power and duty to supervise all public schools in the State of Illinois. Due to this power and duty, liability can be asserted against Defendant ISBE in federal court if: 1) Defendant ISBE discovers that a school district under its supervision is intentionally violating the civil rights of students secured by the United States Constitution and by federal law and 2) should Defendant ISBE then fail to take reasonable steps to attempt to correct such violations of student's civil rights by a school district under its supervision".

A plaintiff must allege facts showing that he has sustained, or is immediately in danger of sustaining a direct injury as a result of defendant's conduct. The injury or its threat must be "real and immed-

iate," not "conjectural" or "hypothetical". City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). The ISBE's counterclaim assumes that the ISBE can be vicariously liable for the Peoria District's conduct. The court of appeals correctly noted that the authority of the ISBE with regard to claimed discrimination within a local district is limited. The ISBE can be liable when, exercising the authority granted it, it has engaged in discriminatory conduct. The ISBE is not, however, vicariously liable for a local district's conduct.

Assuming the ISBE might be a defendant in a suit challenging the local district's gifted program, the ISBE has not alleged that any suit exists or is threatened. Alleged exposure to a civil liability is "wholly speculative" and insufficient to constitute the required

constitutional injury. See City of Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231, 238 (9th Cir. 1980), cert. denied, 449 U.S. 1039 (1980).

The ISBE would be disqualified as a plaintiff even if a sufficient injury were alleged. In order to assert the rights of third parties (the students), the ISBE would have to show that:

1) the ISBE is as effective a proponent of the students' rights as are the students; and

2) the students have a genuine obstacle to the assertion of the right. Singleton v. Wulff, 428 U.S. 106, 114-116 (1976).

Neither requirement is met here. If the ISBE is a potential defendant in a suit brought by the students, the ISBE would have a substantial conflict of interest in representing the interests of the students It is questionable whether the ISBE would fully and adequately prosecute a discrim-

ination claim when that same claim could be asserted against it. See Jenkins by Agyei v. Missouri, 807 F.2d 657, 682 (8th Cir. 1986); School District of Kansas City v. Missouri, 460 F.Supp. 421, 441 (W.D. Mo. 1978), appeal dismissed, 592 F.2d 493 (8th Cir. 1979). Where the relationship between the plaintiff and the third party is adverse, the plaintiff will not be permitted to assert the third party's rights. Gold Cross Ambulance & Transfer, Inc., v. City of Kansas City, 705 F.2d 1005, 1016 (8th Cir. 1983), cert. denied, 469 U.S. 538 (1985).

There is also no genuine obstacle to the students' assertion of their own rights. The students and their parents have standing to sue to protect the students' rights. Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391, 1398 (10th Cir. 1985). The

students have express standing to sue to enforce the EEOA. 20 U.S.C. §1706. The court of appeals below correctly observed that third parties are not entitled to bring suit on behalf of students when there is no obstacle to a suit by the students and their parents. 810 F.2d at 712 n.7 (7th Cir. 1987); Mercer v. Michigan State Board of Education, 379 F.Supp. 580, 584 (E.D. Mich. 1974), aff'd, 419 U.S. 1081 (1974).

Contrary to Petitioner's assertions, the Seventh Circuit's opinion in this case is in no way inconsistent with McNeese v. Board of Education, 373 U.S. 668 (1963). McNeese merely held that students need not resort to the administrative procedure of section 22-19 of the Illinois School Code, Ill. Rev. Stat. ch. 122, ¶22-19, before filing suit in federal court. McNeese did not concern the ISBE's standing or

capacity to bring a direct action to enforce the students' civil rights. Rather, McNeese supports the Peoria District's position that the ISBE's authority is governed by state, not federal law.

Under Illinois law, a local district is required to file with the state superintendent, as a prerequisite for obtaining state aid, an affidavit that the district does not discriminate on the basis of race. Ill. Rev. Stat. ch. 122, ¶18-12. In McNeese, the Court questioned whether the state superintendent would certify a district for state aid if he determined that the affidavit was false. The McNeese Court stated:

> "Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false." 373 U.S. at 676 (1963).

McNeese explicitly recognized that the authority of the superintendent to withhold state funding was governed by Illinois, not federal law.[4]

There is no conflict between the EEOA and Illinois law. Section 22-19 of the Illinois School Code delimits the authority of the ISBE to initiate action to question alleged discrimination within a local district. Aurora East Public School District No. 131 v. Cronin, 92 Ill.2d 313, 442 N.E.2d 511 (1981). A conflict between federal and state law would arise only if

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[4]In a related case involving the Peoria School District and the ISBE, Board of Education of the City of Peoria, School Dist. No. 150 v. Sanders, 150 Ill.App.3d 755, 502 N.E. 2d 730 (3rd Dist. 1986), leave to appeal denied, 116 Ill.2d 321 (1987), the Illinois court answered the question posed by this Court in McNeese. The court held that the ISBE did not have authority to withhold state funds after the ISBE made a unilateral determination that discrimination existed.

the EEOA authorized suit by the ISBE. Had Congress wished to expand the class of plaintiffs to include state boards of education, it could have easily done so. Petitioner asks this Court to "read an implicit grant of standing into Congressional silence," an action this Court refused to take in Bread Political Action Committee v. Federal Election Committee, 455 U.S. 577, 584 (1982). As noted above, however, Congress could not expand the jurisdiction of the Article III courts to include as party plaintiffs those, such as the ISBE, who have not suffered a distinct and palpable injury.

II. THE COURT OF APPEALS PROPERLY DENIED PARENS PATRIAE STANDING TO THE ISBE.

Entities whose power is derivative, and not sovereign, cannot sue as parens patriae. In re Multi-District Vehicle Air Pollution M.D.L. No. 131 v. Automobile Manufacturers Association, Inc., 481 F.2d

122, 131 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1974). That the ISBE is a state agency with only those powers granted by state law was made clear by the Illinois Supreme Court in Aurora East Public School District No. 131. v. Cronin, 92 Ill.2d 313, 326, 442 N.E.2d 511 (1982). See also Board of Education of the City of Peoria, School District v. Sanders, 150 Ill.App.3d 755, 502 N.E.2d 730, 736 (3d Dist. 1986), leave to appeal denied, 116 Ill.2d 21 (1987). The Aurora court held the ISBE had no authority to promulgate regulations with regard to segregation. The limitations placed upon the ISBE in Aurora clearly show the ISBE is merely an agent of the State and cannot exercise the powers of a sovereign.

Parens patriae standing also requires a finding that individuals could not obtain complete relief through a private

suit. People by Abrams v. 11 Cornwell Co., 695 F.2d 34, 40 (2d Cir. 1982), vacated in part on other grounds, 718 F.2d 22 (1983). This requirement is similar to the requirement that there be a genuine obstacle to suit by a third party. Singleton v. Wulff, 428 U.S. 106, 114-16 (1976). The students and their parents could obtain complete relief in a private suit. Therefore, there is no justification for granting parens patriae standing.

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez, 458 U.S. 592 (1982), does not support the ISBE's claim of standing. Snapp was a suit by the Commonwealth of Puerto Rico, not one of its agencies. Puerto Rico sought in Snapp to correct a problem arising outside its borders and beyond the control of its legislature. 458 U.S. at 594-600. The Commonwealth wished to protect not only

the well-being of its residents, but also its sovereign interest in "the benefits that are to flow from participation in the federal system". 458 U.S. at 607-08. Under the circumstances, this Court found the case proper for an exercise of parens patriae jurisdiction. Id. at 609-10.

In the case at bar, the ISBE, a state agency, seeks to resolve a problem within the State Legislature's authority. Thus, Snapp is easily distinguishable from this case, and it provides no authority whatsoever for the ISBE's attempt to exercise standing. The Illinois Legislature has addressed the problem of racial discrimination in public schools and delegated authority for its elimination. That the ISBE is dissatisfied with its statutory role does not confer it with parens patriae standing. On the contrary, the State of Illinois' limited delegation of

authority to the ISBE confirms that it does not have the authority of a sovereign to claim parens patriae standing.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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